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No. 10-682

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RBC CAPITAL MARKETS, LLC
(f/k/a RBC CAPITAL MARKETS CORPORATION),

Petitioner,

—v.—

LEONARD SCHNEIDER, LESLIE SCHNEIDER, SCOTT SCHNEIDER, SUSAN SCHNEIDER, and HIGHLAND CAPITAL MANAGEMENT, L.P.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Leonard Schneider, Leslie Schneider, Scott Schneider and Susan Schneider (the "Schneiders") respectfully request that the Court deny the petition of RBC Capital Markets, LLC (f/k/a RBC Capital Markets Corporation) ("RBC") for a writ of certiorari (the "Petition") to the Court of Appeals for the Second Circuit.

The other respondent, Highland Capital Management, L.P. ("Highland"), filed a separate petition for certiorari, docketed as No. 10-591. RBC filed a brief in support of Highland's petition, and the Schneiders filed a brief in opposition to it.

STATEMENT OF THE CASE

RBC claims that on March 14, 2001, the Schneiders, through their broker, Glen Rauch of Glen Rauch Securities ("Rauch"), entered into an oral contract to sell nine promissory notes (the "Notes"), issued by McNaughton Apparel Group, Inc., to RBC at a price of 51 cents per dollar of face amount, and that the Schneiders breached that contract. App. 2a-3a. Highland claims it was the third-party beneficiary of that contract. After a jury trial, the district court entered a judgment awarding damages to RBC and Highland.

The Court of Appeals held that the Schneiders were entitled to judgment as a matter of law because the evidence was not sufficient for a reasonable jury to find that Rauch had authority to enter into this contract on behalf of the Schneiders. App. 3a. The Statement of the Case in the Petition does not

mention most of the evidence that the Court of Appeals analyzed in reaching that conclusion.

Procedural History

RBC criticizes the Court of Appeals for ignoring prior decisions in the case. Petition at 5. As the Court of Appeals recognized, however, pre-trial decisions in the case had no bearing on the issue it decided. App. 8a. The Court of Appeals discussed in detail the trial evidence relating to Rauch's authority, in particular the transcripts of his telephone conversations with RBC, all but one of which RBC had recorded. *Id.* 3a-8a.[1]

The Evidence at Trial

From January to March 2001, Rauch and RBC negotiated a potential sale of the Notes by the Schneiders to RBC, which planned to re-sell them at pre-arranged prices. App. 4a-5a. On January 8, 2001, Rauch and RBC entered into a written agreement (the "Letter Agreement") that governed their negotiations. The Letter Agreement stated:

> We both understand that the consummation of any transaction remains in the sole discretion and satisfaction of the [Schneiders] and [RBC], including without limitation with respect to price.

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[1] Transcripts of the recorded conversations were in evidence, and what was said in them was not disputed.

Id. 4a. In ensuing telephone conversations with RBC, Rauch made clear that he was authorized to make a firm proposal to sell the Notes only after the Schneiders had approved the terms. *Id.* 5a.

On March 9, 2001, the Schneiders learned that another company might acquire the issuer of the Notes, in which case the Notes would be paid in full. App. 6a. On Monday, March 12, 2001, RBC made an offer to Rauch to buy the Notes at 50.5 cents per dollar of face amount. Rauch said that he expected to speak with the Schneiders' attorney during the day. Court of Appeals Joint Appendix ("J.A.") at A761, A769.[2] Later on March 12, Rauch told RBC that he needed to talk with the Schneiders, and that nothing would happen for another day and a half. *Id.* at A773-74. On the next day, Tuesday, March 13, Rauch told RBC that the Schneiders were "going to have a pow-wow" and "decide what they are going to do." *Id.* at A802.

RBC contends that on the next day, Wednesday, March 14, Rauch entered into a contract to sell the Notes to it. Petition at 4. On March 14, Rauch and RBC had three telephone conversations, the first two

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[2] In that call, RBC said it thought it could offer 51 cents, and asked Rauch what he thought would happen if it did. Rauch said he thought the Schneiders would agree to sell the Notes at that price. RBC mischaracterizes Rauch's prediction as "an offer" by Rauch to sell at 51 cents. Petition at 8-9.

of which RBC recorded. In the morning, RBC called Rauch, who said he had spoken with the Schneiders that morning, but that he was "not going to know before noon" whether they wanted to go forward with a sale at 51 cents. App. 14a (quoting J.A. at A821).

When RBC called Rauch again at 2:18 p.m. (Trial Transcript ("Tr.") 266), he again made it clear that he could not conclude a deal. App. 15a. He explained that the Schneiders "said they wanted to talk to [their] attorney," and that "before I say a word, [the attorney]'s going to put words in my mouth." J.A. at A837. RBC asked Rauch whether he expected to hear from the Schneiders' attorney soon. He replied that he did not and that, while he would be "delighted" if the attorney called him at 5:30 that afternoon, it might take longer. *Id.* at A839. Rauch ended the call by saying, "I'll call you as soon as I know." *Id.* at A842.

Rauch did not call RBC. Instead, RBC called him about ten minutes later. App. 6a-7a. This is the only relevant telephone conversation that RBC did not record. One of the three RBC witnesses on the call testified that Rauch "confirmed size and price with us, 69 million at 51, which means that we had a transaction. . . . [Rauch] was going to get the lawyers to send us a confirm so that we could go to a written form of contract." *Id.* 16a (quoting Tr. 151). There was no evidence that the Schneiders approved, or even were consulted about, a sale during the ten minutes between the second and third calls on March 14. App. 10a-11a.

On the next day, Thursday, March 15, Rauch told RBC he was still waiting to hear from the Schneiders, who were reviewing the Notes and other documents. He added, "I don't think I'm going to know anything before Monday [March 19]." J.A. at A875. On Tuesday, March 20, Rauch told RBC that "[n]othing is going to happen with the [Notes] probably for five weeks." App. 7a (quoting J.A. at A907). The negotiations were effectively over. App. 7a.

The District Court's Decision

At trial, the Schneiders moved under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law on several grounds. After a jury verdict in favor of RBC and Highland, the Schneiders made a motion renewing those grounds under Rule 50(b), and seeking a new trial under Rule 59. The district court denied the motion. App. 22a.

One of the Schneiders' arguments was that Rauch had no authority to agree to a sale of the Notes without the Schneiders' approval of the terms (including the price), and that the evidence was insufficient for a reasonable jury to find either that the Schneiders had approved these terms (in order to establish actual authority) or that their actions created the appearance to RBC of such approval (in order to establish apparent authority). App. 30a-31a.

In its post-trial ruling, the district court did not analyze this argument.[3] The court devoted one paragraph to evidence pertaining to Rauch's authority, in which it did not discuss the recorded telephone conversations. App. 31a-32a. Citing several kinds of evidence, the district court concluded "there was sufficient evidence that Rauch had authority to bind [the Schneiders]." *Id.* None of this evidence bore on whether the Schneiders had approved the terms of the sale claimed by RBC, whether the Schneiders had induced RBC to believe that they had given such approval, or whether Rauch was authorized to enter into a sale of the Notes absent such approval.[4]

The Court of Appeals' Decision

On appeal, all parties agreed that the Court of Appeals should "review[ ] *de novo* the District Court's denial of a motion for judgment as a matter of law." RBC's and Highland's Joint Brief for Plaintiff-Appellee and Third-Party Defendant-Counter-Claimant-Appellee ("RBC/Highland Br.") at 22; *see also* Brief of Appellants ("Schneiders' Br.") at

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[3] The district court observed that "the Letter Agreement did not exclude Rauch from having the authority to bind defendants" (App. 31a-32a), but the Schneiders were not arguing that the Letter Agreement had that effect.

[4] Contrary to RBC's statements (Petition at 7, 15-16, citing App. 26a, 32a), the district court did not refer to impeachment of the Schneiders or Rauch that pertained to Rauch's authority.

27. They also agreed that established case law under Rule 50 required the court "to draw all reasonable inferences in the light most favorable to the non-moving party, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence." RBC/Highland Br. at 22. With the parties in accord on these legal standards, the Court of Appeals' discussion of them was brief. App. 8a-9a.

One of the Schneiders' grounds for appeal was that "the district court erred as a matter of law in concluding that there was sufficient evidence of Rauch's actual or apparent authority to bind the Schneiders to a sale." Schneiders' Br. at 43-44.[5] The Schneiders argued, as they had in the district court, that Rauch had actual authority to enter into an agreement to sell only if they had approved its terms, and had apparent authority only if the Schneiders' conduct had led RBC reasonably to believe they had approved its terms. App. 3a, 10a, 12a. The Schneiders did not argue that Rauch was not their agent, but that his agency was limited, consistent with the Letter Agreement.

RBC and Highland attacked the Schneiders' contentions that their approval of the terms of a sale was required for Rauch to have authority to sell the Notes, and that the Letter Agreement limited

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[5] RBC incorrectly asserts that the Schneiders did not argue in the Court of Appeals that that the evidence on this issue was legally insufficient. Petition at 16.

Rauch's authority to act for them. RBC/Highland Br. at 37-44. They did not point to any evidence establishing Rauch's authority in the event the Court of Appeals adopted the Schneiders' view of that authority.

The Court of Appeals concluded that the evidence would support a reasonable verdict in favor of RBC and Highland "only if it allowed for a reasonable finding that Rauch had actual authority to make the agreement or if RBC relied on his apparent authority to do so." App. 9a. The court described what that required under New York law:

- "To conclude that Rauch had actual authority to enter a contract to sell the notes at fifty-one, a jury would have to find that the Schneiders authorized a sale of the notes at that price or that they had authorized Rauch to exercise discretion as to the terms of the sale." *Id.* 10a.

- "To conclude that Rauch had apparent authority to make the contract, a jury would need to find that the Schneiders induced the reasonable belief by RBC that Rauch made the contract having received the authorization of the Schneiders to do so." *Id.* 13a.

Even though RBC and Highland did not refer the Court of Appeals to evidence to support these elements, the court scoured the record to see whether the evidence, when construed in the light most favorable to RBC and Highland, was sufficient

for the jury reasonably to find that either element was present. App. 10a-20a. The court concluded that "all the evidence showed that Rauch had no actual authority to contract except upon receipt of the sellers' approval of the terms, and there was no evidence that he had received such approval." *Id.* 12a. With regard to Rauch's apparent authority, the court scrutinized RBC's testimony that during the unrecorded March 14 call Rauch said he was "going to get the lawyers to send us a confirm so that we could go to a written form of contract." *Id.* 17a. The court decided that this statement, viewed in the light most favorable to RBC and Highland and in the context of other, undisputed evidence, was legally insufficient to establish apparent authority. *Id.* 18a, 19a.

As a result, the Court of Appeals ordered that judgment as a matter of law be entered in favor of the Schneiders.

REASONS FOR DENYING THE PETITION

RBC contends, under several legal rubrics, that the Court of Appeals looked too intrusively into the facts on which the jury's verdict was based. These complaints rest on an inaccurate depiction of the decision below. The Court of Appeals' consideration of the sufficiency of the evidence was a legal analysis that complied with established rules of appellate review and with the Reexamination Clause. The standard that the court cited and applied is indistinguishable from the one articulated in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-51 (2000). The Court of Appeals did not engage in the improprieties – drawing inferences favorably to the Schneiders, substituting its judgment for the jury's, and weighing the evidence – charged by RBC.

It is well settled that courts of appeals, in their *de novo* review of Rule 50(b) decisions on the legal sufficiency of evidence, do not give deference to district courts' rulings. No cases cited in the Petition say that any such deference should be given in determining the sufficiency of the evidence. Deferring to the district court would be especially inappropriate in this case, given that court's failure to examine the legal issue that the Court of Appeals found dispositive.

Finally, this case presents circumstances, including RBC's and Highland's failure to raise in their Joint Brief to the Court of Appeals the arguments it is asking this Court to consider, that make a grant of certiorari inappropriate.

I. THE COURT OF APPEALS' HOLDING THAT THERE WAS INSUFFICIENT EVIDENCE RAISES NO SUBSTANTIAL QUESTIONS.

The Petition seeks review by this Court to consider whether the Court of Appeals, by directing judgment in favor of the Schneiders as a matter of law under Rule 50(b), violated the Reexamination Clause of the Seventh Amendment "and this Court's precedents." Petition at i. RBC asserts that the Court of Appeals "reexamin[ed] facts once the jury had determined them," thereby "usurp[ing] the constitutionally-protected role of the jury." *Id.* at 21.

This argument is meritless. The Court of Appeals properly identified and applied a familiar Rule 50(b) standard. It did not draw improper inferences or otherwise stray from that standard. The inquiry under Rule 50(b) – whether the trial evidence was sufficient to support a jury verdict – is an issue of law, and appellate courts' *de novo* consideration of that legal issue does not violate the Seventh Amendment. Nothing about the decision below is inconsistent with ordinary appellate practice, and nothing about it warrants review by this Court.

A. In Considering the Legal Sufficiency of the Evidence, the Court of Appeals Looked to the Established Standard.

In its analysis of the legal sufficiency of the evidence, the Court of Appeals followed the established rule for deciding a Rule 50(b) motion

that RBC and Highland cited to that court. The standard to be followed in applying Rule 50(b) is articulated in different ways, but the substance of those articulations is so similar as to make them virtually interchangeable.[6] The Court of Appeals followed, and applied, one of those interchangeable articulations here. App. 8a-9a.

RBC maintains that the Court of Appeals improperly failed to cite the standard that this Court set forth in *Reeves* (a case that RBC and Highland did not cite in their Joint Brief to the Court of Appeals) and instead "created a new standard for Rule 50 review." Petition at 17. The formulation in *Reeves* was as follows:

> Under Rule 50, a court should render judgment as a matter of law when a party has been fully heard on an issue

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[6] The cases cited by RBC (Petition at 17-18 n.22) illustrate the point. They vary considerably in their phrasing of the standard for review under Rule 50(b), but they are substantively similar. *Compare White v. New Hampshire Dep't of Corr.*, 221 F.3d 254, 261 (1st Cir. 2000) ("[O]verriding a jury verdict is warranted only if the evidence is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome.") (internal citations omitted), *with Meaux Surface Prot., Inc. v. Fogleman*, 607 F.3d 161, 169 (5th Cir. 2010) ("[M]otion for judgment as a matter of law should only be granted when the facts and inferences point so strongly in favor of the movant that a rational jury could not reach a contrary verdict.") (internal citations omitted). Yet their substance is consistent. Petition at 17 n.22.

> and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. . . . [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.

530 U.S. at 149, 150 (quotation marks and citations omitted).

In the decision below, the Court of Appeals stated the test as follows:

> [W]e view the evidence in the light most favorable to the party against which the motion was made. [Judgment as a matter of law] is properly granted only when, drawing all reasonable inferences regarding the weight of the evidence and the credibility of witnesses in favor of the non-movant, a reasonable jury could only have found for the movant.

App. 8a-9a. (quotation marks and citations omitted). This formulation closely resembles the one that RBC and Highland presented in their Joint Brief. *See* page 7, *supra* (quoting RBC/Highland Br.).

Both the *Reeves* formulation and the one set forth by the Court of Appeals require reasonable inferences to be drawn in favor of the non-moving party. Both preclude the weighing of evidence or

assessing the credibility of witnesses in favor of the movant. Both define sufficiency as the quantum of evidence necessary for a "reasonable jury" to decide in the non-movant's favor. RBC's assertion that *Reeves* "in no way resembles the standard articulated by [the Court of Appeals] in this case" (Petition at 17 n.22) is wrong. There is no substantial difference between the two, and RBC points to none.

B. In Considering the Legal Sufficiency of the Evidence, the Court of Appeals Applied the Established Standard.

The Court of Appeals properly determined the legal insufficiency of the evidence. It searched the record for evidence bearing on Rauch's authority. App. 10a-17a. It then considered whether, in light of that evidence, with all disputed facts construed and inferences drawn in favor of RBC and Highland (*id.* 8a-9a, 16a-17a, 19a-20a), a reasonable jury could find in favor of RBC and Highland on that issue, and decided it could not. *Id.* 11a, 18a-20a.

The Petition charges the Court of Appeals with making an inquiry that improperly invaded the province of the jury. These unfounded charges provide no basis for the Court to review this decision, as follows:

1. RBC argues that the Court of Appeals drew inferences in favor of the Schneiders. Petition at 18, 20-24. It fails to specify any such improper inference, and there was none. The court credited

the testimony of an RBC witness about Rauch's statements in the unrecorded telephone conversation, and in construing disputed facts and drawing inferences in favor of RBC and Highland it viewed that evidence in the context of other, undisputed evidence, including the Letter Agreement and statements made in recorded calls. App. 19a-20a. *Reeves* directs courts to "review all of the evidence in the record" and to "give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." 530 U.S. at 150-51 (quotation marks and citations omitted). That is what the Court of Appeals did.[7]

2. RBC contends that the Court of Appeals "did not consider at all the undisputed facts that RBC's actions following the [final March 14] call . . . were consistent with [RBC's witnesses'] testimony." Petition at 19. The Court of Appeals looked at this evidence, but recognized that it could show only that RBC witnesses *thought* there was a contract, and that under New York law such a "belief that they had a contract was insufficient [to establish apparent authority] unless the belief was reasonably attributable to Rauch's statements." App. 16a-17a.

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[7] Because the court did not draw any inferences in favor of the Schneiders, *Railroad Co. v. Stout*, 17 Wall. (84 U.S.) 657 (1874) (*see* Petition at 23-24), is irrelevant.

With that link missing, this evidence could not establish Rauch's authority.[8]

3. Contrary to RBC's assertions (Petition at 21, 24), the Court of Appeals made no credibility assessments. The Petition tries to portray the case as a credibility contest between the RBC witnesses and the Schneiders and Rauch: "whether or not there was an agreement to sell the notes was quintessentially a credibility issue." Petition at 20; *see also id.* at 5. Any such credibility contest had no bearing on the court's analysis of the sufficiency of the evidence concerning Rauch's authority.

4. The Court of Appeals did not "weigh evidence" or substitute its judgment for the jury's. *See* Petition at i, 24. Unlike a jury, which decides what evidence it finds convincing, including what inferences to draw and whose testimony to credit, a court ruling on a Rule 50(b) motion analyzes whether the evidence meets a threshold of legal sufficiency. That is the nature of the decision below, and there is nothing unusual or improper about it.

The court followed established legal standards, and its decision does not raise questions meriting the Court's consideration.

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[8] RBC is incorrect that the Court of Appeals ignored other evidence, cited by the district court, that supported its case. Petition at 21, 28-29. None of this evidence supported the facts that the Court of Appeals concluded were required to show Rauch's authority. App. 11a-12a.

C. The Court of Appeals' Decision Did Not Violate the Reexamination Clause.

The Petition repeatedly cites the Reexamination Clause of the Seventh Amendment, but its position as to how that provision affects review of the legal sufficiency of the evidence is unclear.[9] RBC appears to say that by not complying with the established standard for considering the legal sufficiency of the evidence, the Court of Appeals not only committed legal error but also ran afoul of the Reexamination Clause. Petition at 19-21, 24, 27. It is not clear what that adds, other than the suggestion that the court's error is more grave because a constitutional guaranty is implicated.

As shown above, in its *de novo* review of the district court's ruling, the Court of Appeals applied the appropriate test under Rule 50(b). Moreover, that level of appellate review accords with uniform practice in the federal courts and does not violate the Reexamination Clause. This Court has long recognized that a determination as to "[w]hether the evidence was sufficient or otherwise was a question of *law* to be resolved by the court." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659

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[9] In its petition, Highland argues that the Reexamination Clause restricts appellate review of district courts' denials of Rule 50(b) motions to an abuse of discretion standard. RBC supports this conclusion (Petition at 31 n.24), but does not itself make that argument.

(1935) (emphasis added). "As the issue is one of law, the appellate court's review is plenary. Therefore, as innumerable cases decided over the years make clear, the appellate court's review of a Rule 50(b) motion obviously is *de novo*." 9B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2540 (3d ed. 2008). Each court of appeals reviews *de novo* decisions on Rule 50(b) motions.[10] Therefore, in each federal circuit "the analysis [of the sufficiency of the evidence] that is employed is the same in the trial court and on appeal." *Id.* § 2524.

Such review is fully consistent with the Seventh Amendment. The Reexamination Clause limits certain appellate review of factual findings by providing that "no *fact* tried by a jury, shall be otherwise re-examined in any Court of the United

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[10] *See, e.g.*, *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 13 (1st Cir. 2009); *Montgomery County v. Microvote Corp.*, 320 F.3d 440, 445 (3d Cir. 2003); *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir. 1999); *Cooper Indus., Inc. v. Tarmac Roofing Sys., Inc.*, 276 F.3d 704, 707 (5th Cir. 2002); *Aetna Casualty & Surety Co. v. Leahey Constr. Co.*, 219 F.3d 519, 532 (6th Cir. 2000); *Wallace v. McGlothan*, 606 F.3d 410, 418 (7th Cir. 2010); *Hinz v. Neuroscience, Inc.*, 538 F.3d 979, 984 (8th Cir. 2008); *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1185 n.8 (9th Cir. 2004); *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1243-1244 (10th Cir. 2009); *Proctor v. Fluor Enters.*, 494 F.3d 1337, 1347 n.5 (11th Cir. 2007); *Novak v. Capital Mgmt. & Dev. Corp.*, 570 F.3d 305, 311 (D.C. Cir. 2009); *Poly-America, L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1307 (Fed. Cir. 2004).

States, than according to the rules of the common law." U.S. CONST., amend. VII (emphasis added). This provision prohibits only reexaminations of juries' findings of *facts*. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 & n.11 (2001). It does not apply to appellate courts' rulings on issues of law, like the one rendered here.

The settled rule that courts of appeals decide the legal sufficiency of evidence does not conflict with the Constitution. In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967), this Court explained, "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v." Citing *Neely*, the Court reaffirmed the constitutionality of appellate review of Rule 50 rulings in *Weisgram v. Marley Co.*, 528 U.S. 440, 449-50, 454 n.10 (2000). While *Neely* and *Weisgram* focused on the Seventh Amendment's right to a jury trial, these pronouncements would have been nonsensical if the Court believed an appellate court's entry of judgment as a matter of law, after *de novo* review, would violate another right provided in the same, one-sentence amendment.

The Court of Appeals' *de novo* review and reversal of the denial of the Schneiders' Rule 50(b) motion does not raise any substantial question under the Reexamination Clause.

II. THE COURT OF APPEALS' LACK OF DEFERENCE TO THE DISTRICT COURT RAISES NO SUBSTANTIAL QUESTIONS.

The Petition asks this Court to consider whether the Court of Appeals "violate[d] this Court's precedents" by not deferring to the trial court's denial of the Schneiders' Rule 50(b) motion. Petition at i. But no such deference was due, and no precedents were violated. In their *de novo* review of Rule 50(b) decisions, courts of appeals give no deference to district courts' rulings. This Court's decisions do not suggest a different approach. Lack of deference is inherent in the nature of the inquiry, and raises no questions for this Court's review.

A. Decisions on the Legal Sufficiency of the Evidence Do Not Warrant Deference from Appellate Courts.

Because rulings on Rule 50(b) motions resolve legal issues, appellate review is *de novo*. *See* page 18, *supra*. By definition, no deference is given to those district court decisions: "When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

RBC's argument to the contrary has two components. First, it asserts that this Court "has held that an appellate court should give deference to the trial judge in determining the sufficiency of the evidence supporting a jury's verdict." Petition at 28. The Rule 50 cases cited in support stand only for the

proposition that, where a court of appeals has held that the evidence was legally insufficient for it to uphold the verdict, it should be alert to the trial court's inclinations in deciding whether the proper remedy is a new trial or the entry of judgment as a matter of law. *Weisgram*, 528 U.S. at 443-44; *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 & n.3 (2006); *Neely*, 386 U.S. at 325-26; *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947).[11] These cases do not say that a court of appeals should defer to a district court's decision as to the sufficiency of the evidence.[12]

The second part of RBC's argument relies on a single case, *ABT Building Products Corp. v. National Union Fire Insurance Co.*, 472 F.3d 99 (4th Cir. 2006). Petition at 30 n.23. *ABT Building Products* followed the settled rule that Rule 50(b) decisions are reviewed *de novo*. 472 F.3d at 113. The portion of the decision quoted in the Petition does not

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[11] Even when an appellate court is considering the proper remedy, deference to the trial court is called for only where the "appellate tribunal determines that the district court is better positioned" to decide the remedy, and "the court of appeals has authority to render the final decision." *Weisgram*, 528 U.S. at 443, 444.

[12] In *Weisgram*, the court of appeals "review[ed] *de novo* the District Court's decision to deny Marley's motion for [judgment as a matter of law]." *Weisgram v. Marley Co.*, 169 F.3d 514, 516 (8th Cir. 1999), *aff'd*, 528 U.S. 440 (2000).

suggest deference should be given to a district court's Rule 50(b) decision. When it said it was deferring to the district court, the Fourth Circuit was referring to the district court's interpretation of its own earlier decision in the case: "when a district court's decision is based on an interpretation of its own order, our review must be highly deferential." *Id.* at 114-15 (quotation marks and citation omitted).

No case cited in the Petition supports a departure from the rule that review of decisions on Rule 50(b) motions is *de novo*. There is no reason for this Court to review the Court of Appeals' straightforward application of that rule.

B. Giving Deference to the District Court's Decision Would Be Inappropriate in This Case.

Even if some deference were appropriate in some appeals from Rule 50(b) decisions, it would not be appropriate in this case. The dispositive issue in the decision below was the sufficiency of the evidence of Rauch's authority to enter into the agreement claimed by RBC and Highland. The key factors from the trial record were the effect of the Letter Agreement and the contents of telephone conversations as reflected in the transcripts. The Court of Appeals was fully capable of assessing the unambiguous Letter Agreement and the communications that were reflected verbatim in transcripts. With regard to the disputed facts about what was said during the unrecorded call, the district court said nothing to which the Court of

Appeals could have deferred, and the Court of Appeals complied with the established standard by accepting as true RBC's testimony about it.

With respect to the issue decided by the Court of Appeals, the district court did nothing to which the Court of Appeals meaningfully could defer. Under these circumstances, it would have made no sense to defer to the district court's denial of the Schneiders' Rule 50(b) motion.

III. THIS IS NOT AN APPROPRIATE CASE FOR GRANTING CERTIORARI.

Even if this Court had an interest in addressing the questions in the Petition, this case would not provide an appropriate vehicle for doing so because (1) RBC and Highland did not assert these positions in their Joint Brief to the Court of Appeals, (2) if RBC were correct, the Court of Appeals at most applied erroneously an established legal standard, and (3) requiring deference to the district court's decision would be very unlikely to change the result in this case.

1. In their Joint Brief to the Court of Appeals, RBC and Highland did not contend that the Court of Appeals was required to follow the *Reeves* formulation, that the Reexamination Clause limited the Court of Appeals' review of the district court's Rule 50(b) determination, or that the district court's Rule 50(b) decision should be given deference. Highland's and RBC's Joint Brief asserted that appellate review of the district court's denial of the

Rule 50(b) motion was *de novo* (RBC/Highland Br. at 22), and it did not mention the Reexamination Clause or *Reeves*.[13]

Requiring that issues be briefed in and considered by the courts of appeals ensures that this Court has the benefit of one or more lower courts' thinking, allows issues of importance to ferment and percolate through the judicial system, and often leads to better-considered decisions. Therefore, "[i]n the ordinary course we do not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001); *accord*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999). The fact that a petition raises questions that were not raised in or ruled on by the court below "is ordinarily fatal to the petition." Robert L. Stern et al., SUPREME COURT PRACTICE 459-60 (8th ed. 2002).

2. The standards for appellate review of a decision on a Rule 50(b) motion are clear and well established. *See* pages 11-14, *supra*. The Petition tries to show that the Court of Appeals departed from those standards. Petition at 20-21. If the Court of Appeals did that, its error would constitute nothing more than an isolated departure from a well

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[13] In a petition for rehearing in the Court of Appeals, RBC contended that the Court of Appeals, by failing to adhere to its own standard for reviewing jury findings, had "dangerously encroach[ed] upon the jury's Seventh Amendment functions," and it cited *Reeves*. Pet. for Reh'g En Banc at 1, 4, 12.

recognized rule, and "the misapplication of a properly stated rule of law" is generally not a sufficient basis for granting certiorari. SUP. CT. R. 10. Even if the Court of Appeals may have reached the wrong result, the fact remains that the "Court is too busy to supervise every application of its precedents to particular facts and circumstances, even if a given application is arguably wrong." Stern et al., SUPREME COURT PRACTICE 459.

RBC contends that the Court of Appeals' overly intrusive review is part of a broader trend in which courts of appeals are usurping the role of fact-finder. Petition at 26-28. The Petition supports that contention with a 21-year-old law review article and three dissenting opinions by court of appeals judges over the past eight years. *Id.* The author of the law review article used a quantitative review of published appellate decisions from 1984 and 1985 to argue that reversals based on legally insufficient evidence had increased, especially with President Reagan's appointments to the courts of appeals. Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 246, 256 (1989). Apart from whether that proved anything about appellate decisions in the mid-1980s, it cannot support the Petition's contention that 25 years later the courts of appeals are encroaching on the domain of juries. Each of the three dissents cited by the Petition argued only that the panel majority was wrong about the sufficiency of the evidence in the case before it. The Petition fails to show there is a need for this Court "to curb

the abuse of power by appellate courts." Petition at 28.

3. It is extremely likely that, even if the Court of Appeals had given some deference to the district court's Rule 50(b) determination, it would have reached the same outcome. The Court of Appeals concluded that there was "*no* evidence" that Rauch had actual authority to enter into the contract without the Schneiders' approval, that "*nothing* in the record supports a finding" that such approval was given, and that there was "*no* evidence" suggesting that respondents induced RBC to believe that Rauch had any authority beyond the limitations set forth in the Letter Agreement. App. 10a, 12a, 13a (emphasis added). It is hard to see how deference to a court that did not broach these issues would have changed its conclusion.[14]

Finally, RBC's assertion that the decision below "has created significant uncertainty regarding the enforceability of oral agreements for the sale of securities" (Petition at 31) is unsubstantiated and illogical. The Court of Appeals' analysis of Rauch's authority stemmed from its interpretation of the

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[14] The district court's failure to address the elements that needed to be proven to establish Rauch's authority was an error of law. Therefore, even under Highland's contention that appellate review of this decision was limited to abuse of discretion (*see* Petition at 31 n.24), the outcome would be the same since "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

Letter Agreement and Rauch's confirmatory statements. App. 3a-4a, 13a, 19a. The court did not suggest that the requirements it imposed to establish that authority under New York law would apply in the absence of a similar agreement or that the terms of the Letter Agreement are common. Rather, the court went out of its way to limit its holding to the specific circumstances presented. *E.g.*, *id.* 11a-12a, 19a-20a. The decision below is important only to parties that are governed by agreements limiting agents' authority that are like the Letter Agreement. It is not clear that there are such parties beyond those involved in this case.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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